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MEMORANDUM

TO: Committee on Legal Services
FROM: Office of Legislative Legal Services
DATE: 20 October 2020
SUBJECT: The Publication of House Bill 20-1230¹

Questions

1. During the 2020 legislative session, the General Assembly enacted House Bill 20-1230, which addressed the continuation of the "Occupational Therapy Practice Act" (HB 1230). The bill was to take effect on September 14, 2020. Due to a statutory sunset provision in the "Occupational Therapy Practice Act" (the practice act), the entire practice act, including portions of the practice act that HB 1230 was to amend, repealed two weeks earlier on September 1, 2020. Can the provisions of HB 1230 revive and amend provisions of law after those provisions had repealed?

¹ This memorandum was prepared by the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

2. When an agency or function is allowed to repeal, the agency or function continues to operate for a wind-up period of one year.² It is the practice of the General Assembly to publish for one year the statutes authorizing the agency or the function, as the statutes existed at the time of repeal. Should the provisions of HB 1230 that purported to amend the practice act be published in the 2020 Colorado Revised Statutes?

Short Answer

1. **No.** The Colorado constitution expressly states that, "[n]o law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only...."³ Therefore, the mere reference to the continuation of the "Occupational Therapy Practice Act" in the long title of HB 1230 is insufficient either to revive or extend the existence of the entire practice act. And, in referring to the revival of a law, the same section of the constitution further states that, "...so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length".⁴ The constitution, therefore, prevents the substantive sections of HB 1230, which were intended to make changes to only limited portions of the practice act, from having the effect of reviving the entire practice act. In the past when an agency or function has repealed before being extended and the General Assembly intended that the agency or function continue to operate, the General Assembly has enacted legislation within the one-year statutory wind-up period to recreate and re-enact the agency or function.
2. **No.** In similar situations in the past when an agency or function subject to the sunset laws has repealed before being extended, it has been the custom and practice of the General Assembly to publish the law, as it existed at the time of its repeal, for the one-year statutory wind-up period. To be consistent with the custom and practice of the General Assembly, the practice act should be published in the 2020 Colorado Revised Statutes without the amendments

² Section 24-34-104 (2)(b), C.R.S., provides that, if an agency or function is allowed to repeal, the agency continues in existence and the function continues to be performed for a period of one year after the specified repeal date to wind up the affairs of the agency or function.

³ Colo. Const. art. V, § 24.

⁴⁴ *Id.*

included in HB 1230, because the practice act repealed two weeks before it was purportedly amended by HB 1230.

Discussion

1. **HB 1230, as passed, could not revive the practice act because the Colorado Constitution prohibits the revival or extension of a law by mere reference to its title and requires that a repealed law be re-enacted by legislation and published at length.**

During the 2020 legislative session, the General Assembly enacted HB 1230, concerning the continuation of the "Occupational Therapy Practice Act", and, in connection therewith, implementing the recommendations contained in the 2019 sunset report by the department of regulatory agencies. House Bill 1230 was written to extend the practice act and implement, with amendments, the recommendations of the department of regulatory agencies in its sunset review and report on the licensing of occupational therapists and occupational therapy assistants by the director of the division of professions and occupations in the department of regulatory agencies (director). The General Assembly enacted HB 1230 on June 10, 2020, and the Governor signed the bill on July 11, 2020.

Section 16 of HB 1230 specified that the bill would take effect on the day following the expiration of the 90-day period after final adjournment of the General Assembly. When the bill was introduced on January 31, 2020, the expected date to adjourn *sine die* was May 6, 2020, thus the anticipated effective date of HB 1230 was August 5, 2020. However, the worldwide pandemic caused by the novel coronavirus COVID-19 and the ensuing state executive orders declaring a public health disaster emergency resulted in a six-week temporary adjournment of the General Assembly and a significantly delayed final adjournment on June 15, 2020. Due to the delayed final adjournment, HB 1230 did not take effect until September 14, 2020. Meanwhile, because of the sunset provision set out in section 12-270-120, C.R.S., the entire practice act repealed by operation of law on September 1, 2020, two weeks before HB 1230 took effect. While section 1 of HB 1230 would have amended that statutory provision to extend the practice act for an additional ten years, that section of the bill did not take effect before the statutory section it was attempting to amend, section 12-270-120, C.R.S., automatically repealed on September 1, 2020.

The Colorado Constitution prevents an interpretation that the mere reference to the continuation of the "Occupational Therapy Practice Act" in the bill's title effectively extends the entire practice act when the organic act itself had already repealed in its

entirety. Article V, section 24 of the Colorado Constitution (section 24) expressly states that "[n]o law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." The Colorado Supreme Court, in applying section 24, has implied that it is one of those types of constitutional provisions that are not merely directory or merely rules for the guidance of the legislature in the enactment of laws, but rather are mandatory and are to be classed among the limitations on legislative power, rather than among those regulations of legislative conduct the disobedience of which is held not necessarily fatal.⁵

In considering and applying section 24 in various cases, the Colorado Supreme Court has found that the purpose of this constitutional provision is to prevent obscurity, confusion, and uncertainty in the law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume.⁶

In one such case, the Colorado Supreme Court considered a legislative act that attempted to extend and confer the provisions of one law and amend the provisions in another law by mere reference to those laws by subject only, rather than by properly re-enacting so much of the prior laws that it purported to extend and amend. The Supreme Court observed that no person, merely by reading the legislative act alone, could form any idea of its effect or meaning. The court further observed that no person, by simply reading the sections of the other laws that the legislative act under consideration purported to extend and modify, could obtain any proper or adequate conception of those laws' purpose or meaning.⁷

Similarly, HB 1230 cannot be read to extend the entire "Occupational Therapy Practice Act" merely by its reference to the continuation of the practice act in the bill's long title. In fact, HB 1230 attempted to amend only twelve⁸ of the twenty sections of law

⁵ *Edwards v. Denver & R.G.R.R.*, 13 Colo. 59, 21 P. 1011 (1889).

⁶ *Callahan v. Jennings*, 16 Colo. 471, 27 P. 1055 (1891); *City & County of Denver v. People*, 103 Colo. 565, 88 P.2d 89, appeal dismissed, 307 U.S. 615, 59 S. Ct. 1044, 83 L. Ed. 1496, reh'g denied, 308 U.S. 633, 60 S. Ct. 69, 84 L. Ed. 527 (1939).

⁷ *People v. Friederich*, 67 Colo. 69, 185 P. 657 (Colo. 1919).

⁸ House Bill 20-1230 purported to amend four complete sections of the "Occupational Therapy Practice Act" (sections 12-270-105, 12-270-111, 12-270-117, and 12-270-120) and only portions of eight other

that comprised the repealed practice act. And, even among those sections of the practice act that were included in the text of the bill, only portions of eight of those statutory sections were actually amended and not the entire statutory sections. Put another way, other than the reference to the "Occupational Therapy Practice Act" in the long title of HB 1230, the bill did not include the entire practice act. If HB 1230 re-enacted the "Occupational Therapy Practice Act", it was either by mere reference to the practice act in the long title of the bill, which is expressly prohibited by section 24, or it was by recreating only pieces of the practice act. As such, the "recreated" practice act would be incomplete and therefore "broken" law from which, as the court observed in the *Friederich* case, no person by reading the bill alone or by reading the incomplete practice act, could form any idea of its effect or meaning or obtain any proper or adequate conception of its purpose or meaning.

It is therefore evident that the requirement in the second clause of section 24 that so much of any law that is to be revived, amended, extended, or conferred, "...shall be re-enacted and published at length", is for the purpose of ensuring that the effect and meaning of the state's laws are clear. Based on this constitutional mandate it is not possible to revive the repealed practice act affecting occupational therapists and occupational therapy assistants, let alone amend it, without re-enacting it by legislative action and publishing it at length.

While the first section of HB 1230⁹ purported to extend the automatic statutory repeal of the practice act in the organic statute, section 2 of the bill¹⁰ amended the schedule of sunset repeal dates as it related to the practice act. However, the mere repeal of what had been the September 1, 2020, repeal date in schedule of review of regulatory agencies and functions—what was essentially a conforming amendment—cannot be argued to have successfully extended the life of the practice act that had effectively repealed two weeks earlier. That is because section 2-4-302, C.R.S., in further ensuring clarity in the law, states that, "[t]he repeal of a repealing statute does not revive the

sections of the practice act, sections 12-270-102, 12-270-104, 12-270-106, 12-270-107, 12-270-108, 12-270-110, 12-270-113, and 12-270-114).

⁹ Section 1 of House Bill 20-1230 would have amended a section within the "Occupational Therapy Practice Act", section 12-270-120, C.R.S., to extend the automatic statutory repeal of the practice act from September 1, 2020, to September 1, 2030. Article 35 is referred to in this memo as the "organic" act or statute and is located in title 12 of the Colorado Revised Statutes concerning professions and occupations.

¹⁰ Section 2 of House Bill 20-1230 amended that portion of the schedule of review of regulatory agencies and functions listed in article 34 of title 24, C.R.S., related to the licensing of occupational therapists and occupational therapy assistants in accordance with article 270 of title 12, C.R.S.

statute originally repealed". In other words, while section 2 of HB 1230 repealed the portion of the sunset law that identified September 1, 2020, as the day the practice act would repeal or "sunset", that legislative action alone was insufficient to revive the entire occupational therapy practice act after September 1, 2020. The repeal [in section 2 of HB 1230] of the repealing statute [section 24-34-104 (19)(a)(VII), C.R.S.] does not revive the statute [the entire practice act] that had already repealed on September 1, 2020. The Colorado Supreme Court has observed that this rule against implied revival applies only where the statute itself has actually repealed, as was the case with the September 1, 2020, repeal of the practice act.¹¹

2. Based on custom and practice, the provisions of the practice act that are published in the 2020 Colorado Revised Statutes should be those provisions that were in place when the practice act repealed and should not include amendments made in HB 1230.

Section 24-34-104 (2)(b), C.R.S., states that, "[u]pon repeal, an agency continues in existence, or, in the case of the repeal of a function, the function continues to be performed, until the date that is one year after the specified repeal date for the purpose of winding up affairs." Accordingly, despite the repeal of the practice act on its scheduled sunset date of September 1, 2020, the authority and functions of the director related to the regulation of occupational therapists and occupational therapy assistants will continue for a full year, until August 31, 2021.

In addition, section 24-34-104 (2)(b), C.R.S., states that, "[d]uring the wind-up period, the repeal does not reduce or otherwise limit the powers or authority of the agency; except that a license issued or renewed during the wind-up period expires at the end of the period and original license and renewal fees are prorated accordingly." In the case of the director's functions related to the regulation of occupational therapists and occupational therapy assistants, this statutory provision ensures that the director may continue issuing and renewing licenses and conducting the duties necessary for the regulation of the profession under the practice act until August 31, 2021. As a result, the risk of any interruption in the director's ongoing regulatory functions, including licensing functions, is therefore minimal during the wind-up period and the effect on practitioners is also thereby minimized.

Furthermore, section 24-34-104 (8), C.R.S., allows the General Assembly to re-establish a repealed agency or function during the wind-up period. Section 24-34-104

¹¹ *Terminal Drilling CO. v. Jones*, 84 Colo. 279, 269 P. 894 (1928).

(8), C.R.S., states, "[i]f an agency or function repeals pursuant to the provisions of this section and the general assembly reestablishes the agency or function during the wind-up period with substantially the same powers, duties, and functions, the agency or function continues." As stated earlier, the state constitution requires that any such reestablishment of the law be done by re-enacting the law and publishing it at length. So, while this provision in the sunset law gives authority to the General Assembly to reestablish an otherwise repealed agency or function that has previously sunset, the General Assembly must do so by the proper recreation and re-enactment of the law in a way that conforms to the constitutional requirement.¹²

When an agency or function subject to the sunset laws has repealed due to unintentional oversight, drafting error, intentional repeal, or executive veto, it has been the General Assembly's practice and custom to publish the law as it existed at the time of its repeal for the one-year period designated in statute for the purpose of winding up the affairs of the agency or function.¹³ If the General Assembly sought to reestablish the agency or function pursuant to the authority granted to it by section 24-34-104 (8), C.R.S., the General Assembly would do so by legislation re-enacting and recreating the agency or function during the wind-up period.

It is worth noting that in 2013 a situation similar to the one at hand arose in which a bill was enacted and took effect that purported to extend a regulatory board and amend the board's statute, but the extension was not effective.

In 2013, the board of real estate appraisers was allowed to repeal pursuant to statute. The 2013 sunset bill to extend the board, Senate Bill 13-155, omitted any provision to extend the statutory repeal date in the organic act concerning the board, part 7 of article 61 of title 12, C.R.S. Part 7 was nonetheless published in the 2013 Colorado Revised Statutes, with the substantive changes the bill included because the automatic repeal and the effective date of Senate Bill 13-155 were both July 1, 2013. In this case, the act did not repeal *before* the bill went into effect (as with SB 1230). Instead, the repeal and the amendments took effect at the same instant. The General Assembly

¹² Senator Fields, the prime Senate sponsor of House Bill 20-1230, has authorized the Office of Legislative Legal Services to disclose that she has submitted an early bill request for the 2021 legislative session to recreate and reenact the "Occupational Therapy Practice Act".

¹³ Examples of the actions taken in publishing the statutes in these situations during the statutory wind-up period are attached as Appendix A.

published part 7 of article 61 of title 12, C.R.S., with the amendments made in Senate Bill 13-155, because those amendments became part of the law when it repealed.¹⁴

The following editor's note appeared after the part heading:

Editor's note: Section 12-61-703 (6) provides for the termination of the board of real estate appraisers and repeal of this part 7, effective July 1, 2013. However, the provisions are printed in the statutes for an additional year to accommodate the one-year period for winding up the affairs of the board in accordance with 24-34-104 (5), (12), and (12.5).

And the following editor's note appeared in the 2013 Colorado Revised Statutes, following the individual sections of the part 7:

Editor's note: Section 12-61-703 (6) provides for the repeal of this part 7, effective July 1, 2013. However, this part 7 and amendments made to this part 7 by Senate Bill 13-155 are shown to reflect the legislative intent. For further explanation regarding the wind-up period, see the editor's note following the part heading.

In 2014, during the one-year wind-up period, the General Assembly enacted Senate Bill 14-117 to recreate and re-enact the board of real estate appraisers and its duties and responsibilities as they existed prior to July 1, 2013, with amendments, which provisions were published at length in the 2014 Colorado Revised Statutes.

As stated previously, in the case of HB 1230, the amendments to the practice act did not take effect since the bill did not take effect until two weeks after the practice act had repealed. Thus, to be consistent, the practice act should be published in the 2020 Colorado Revised Statutes as it existed at the time of repeal, without the amendments in HB 1230.

Conclusion

The Colorado constitution prohibits the revival or extension of a law by reference to its title only and requires that any law that is revived or extended be re-enacted and published at length. Because HB 1230 did not take effect until two weeks after the practice act had repealed by operation of law, and HB 1230 did not re-enact and republish the practice act in full, the provisions of HB 1230 that amended the practice act could not

¹⁴ Similarly, in 1996, the state board of dental examiners was allowed to repeal pursuant to statute. The 1996 sunset bill to extend the board, Senate Bill 96-87, omitted any provision to extend the statutory repeal date in the organic act concerning the board (section 12-35-104, C.R.S.). Article 35 of title 12, C.R.S., was nonetheless published in the 1997 Colorado Revised Statutes, with the substantive changes the bill included because the automatic repeal and the effective date of Senate Bill 96-87 were both July 1, 1996.

revive the act. Further, based on the past practice of the General Assembly in publishing the statutes that govern an agency or function during the statutory one-year wind-up period after the agency or function repeals, the practice act should be published as it existed at the time of repeal, without the amendments in HB 1230, which did not take effect since the bill did not take effect until two weeks after the repeal.

APPENDIX A

2018-2019

In the 2018 regular legislative session, the sunset bills House Bill 18-1149 and House Bill 18-1175, to continue the consumer insurance council and the community association manager (CAM) licensing program, respectively, were each postponed indefinitely. In the 2018 C.R.S., section 10-1-133 concerning the consumer insurance council and part 10 of article 61 of title 12 concerning the CAM licensing program, appear only as headnotes indicating that the section/part repealed. (The associated editor's notes are standard.)

In 2019, during the one-year wind-up period, the General Assembly enacted House Bill 19-1150 which recreated and re-enacted the consumer insurance council and its duties and responsibilities, as those laws existed at the time of the council's repeal on July 1, 2018, with modifications. It was published at length in the 2019 C.R.S.

Also in 2019, House Bill 19-1212 would have recreated and re-enacted the CAM licensing program and the duties and responsibilities of the division of real estate and its director with regard to CAM licensing as those laws existed at the time of their repeal on July 1, 2018, with amendments reflecting a repeal date of September 1, 2020. However, the Governor vetoed House Bill 19-1212.

2003-2004

In 2003, the Governor vetoed the sunset bill to extend the state board of dental examiners (board) and its regulation of dentists and dental hygienists, Senate Bill 03-120, and the board repealed on July 1, 2003. Despite the repeal of the board, the 2003 C.R.S. included article 35 of title 12 concerning the regulation of dentists and dental hygienists, with the following editor's note after the article heading:

Editor's note: Section 12-35-104 (5)(b) provides for the termination of the state board of dental examiners and the repeal of this article, effective July 1, 2003. However, the provisions are printed in the statutes for an additional year to accommodate the one-year period for winding up the affairs of the board in accordance with section 24-34-104 (5), (12), and (12.5).

The following editor's note followed section 12-35-104:

Editor's note: Subsection (5)(b) of this section provides for the termination of the state board of dental examiners and the repeal of this article, effective July 1, 2003. However, the provisions are printed in the statutes for an additional year to accommodate the one-year period for winding up the affairs of the board in accordance with section 24-34-104 (5), (12), and (12.5).

In 2004, during the one-year wind-up period, the General Assembly enacted House Bill 04-1102 to recreate and re-enact the board and its regulation of dentists and dental hygienists, with amendments. It was published at length in the 2004 C.R.S.

2002-2003

During the 2002 regular legislative session, the sunset bill to continue the division of insurance, House Bill 02-1136, "died on the calendar" and was deemed lost upon adjournment of the General Assembly *sine die* and, accordingly, article 1 of title 10 concerning the division of insurance repealed on July 1, 2002, pursuant to section 10-1-103 (6)(b), C.R.S. However, the 2002 C.R.S. included article 1 of title 10 despite the statutory repeal, and the following editor's note appeared after the article heading:

Editor's note: Section 10-1-103 (6) provides for the termination of the division of insurance and the repeal of this article, effective July 1, 2002. However, the provisions are printed in the statutes for an additional year to accommodate the one-year period for winding up the affairs of the division in accordance with section 24-34-104 (5), (12), and (12.5).

In 2003, during the one-year wind-up period, the General Assembly enacted Senate Bill 03-059 to recreate and re-enact the division and reinstate its regulatory functions which reestablished provisions were published at length in the 2003 C.R.S.